KVAERNER PROCESS SYSTEMS ASIA PACIFIC SDN BHD *a*

v.

TRENERGY FPSO SDN BHD

HIGH COURT MALAYA, KUALA LUMPUR *b*
T SELVENTHIRANATHAN J
[ORIGINATING SUMMONS NO: D7-24-95-2001]
16 JULY 2001

CIVIL PROCEDURE: *Injunction - Ex parte interim injunction - Whether injunction had lapsed - Whether court had jurisdiction to grant a holding-over order - Rules of the High Court 1980, O. 29 r. 1(2), (2B), (2BA)* *c*

The plaintiff had applied by way of an originating summons for an injunction against the defendant from making any demand on a performance bond until the conclusion of certain arbitration proceedings between the plaintiff and the defendant. The defendant raised a preliminary objection which was dismissed; however, by the time the preliminary objection was dismissed, the *ex parte* interim injunction had automatically lapsed in accordance with O. 29 r. 1(2B) of the Rules of the High Court ('RHC') at the end of 21 days from the date on which it had been granted. The plaintiff then orally applied for an interim holding-over order to preserve the *status quo* pending the hearing of its amended originating summons on its merits. *d* *e*

Held:

[1] Since this court was bound to follow the decision of the Court of Appeal in *Cheah Cheng Lan v. Heng Yea Lee & Ors*, it had no jurisdiction to grant a holding-over order where the interim injunction, which had been granted *ex parte* pursuant to the application made under O. 29 r. 1(2) of the RHC, had automatically lapsed. Further, as the *inter partes* hearing to set aside that *ex parte* injunction had not been concluded within 21 days of it being granted, this court did not have the jurisdiction to grant what would tantamount to another *ex parte* interim injunction. *f* *g*
(pp 228 h & 229 a-b)

[2] When the subject matter in the present case came to be heard *inter partes*, it had been taken out of the circumscribing limits of the provisions of O. 29 r. 1 of the RHC as applicable to the revocation or setting aside of an *ex parte* interim injunction. In these circumstances, the court was no longer concerned with the *inter partes* hearing of an order for an interim injunction granted *ex parte* for O. 29 r. 1(2BA) of the RHC, as interpreted by the Court of Appeal, to apply. On the other hand, as the life of an *h* *i*

interim injunction granted on an *ex parte* application "shall automatically lapse at the end of 21 days from the date on which it is granted" in accordance with O. 29 r. 1(2B) of the RHC, it followed that the court had no jurisdiction to resuscitate the lapsed interim injunction by breathing new life into it by a holding-over order. (pp 232 g - 233 a)

[Application for interim holding-over order dismissed.]

Case(s) referred to:
Cheah Cheng Lan v. Heng Yea Lee & Ors [2001] 1 CLJ 727 ***(foll)***
Dimbleby & Sons Ltd v. National Union of Journalists [1984] 1 All ER 751 ***(refd)***
Lim Chong Construction Co Sdn Bhd v. Silam Quarry Sdn Bhd [1990] 1 CLJ 1158; [1990] 2 CLJ (Rep) 374 ***(refd)***
Lim Nyook Yin v. Ultratech Sdn Bhd & Anor [1995] 1 CLJ 215 ***(refd)***
Umas Sendirian Bhd v. RHB Bank Bhd & Anor [2000] 6 CLJ 564 ***(refd)***
Utusan Melayu (Malaysia) Berhad & Anor v. Chan Tse Yuen [1989] 1 CLJ 149; [1989] 1 CLJ (Rep) 163 ***(refd)***

Legislation referred to:
Arbitration Act 1952, s. 6
Rules of the High Court 1980, O. 7, O. 29 r. 1(1), (2), (2B), (2BA), O. 92 r. 4

For the plaintiff - Eugene Jayaraj (Sabarina Samadi & Savita Saigal); M/s Zaid Ibrahim & Co
For the defendant - S Sivaneindiren (Sia Siew Mun); M/s Cheah Teh & Su

Reported by Suresh Nathan

JUDGMENT

T Selventhiranathan J:
The plaintiff took out the originating summons herein dated 11 April 2001, *inter alia*, for the following reliefs:

1. for an order that the defendant by itself, its directors, officers, servants or agents or howsoever otherwise be immediately restrained by an injunction from making any demand on performance bond No DnBs/98/099 dated 19 May 1998 issued by Den Norske Bank ASA Singapore Branch until the conclusion of the arbitration proceedings between the plaintiff and the defendant under s. 6 of the Arbitration Act 1952 ("the Act"); and

2. for an order that the defendant by itself, its directors, officers, servants or agents or howsoever otherwise be immediately restrained by an injunction from claiming or receiving any payment under the said performance bond until the conclusion of the arbitration proceedings between the plaintiff and the defendant under s. 6 of the Act.

At the same time the plaintiff also took out an *ex parte* application by way of a summons in chambers in encl. (3) ("the application") on a certificate of urgency asking for similar reliefs as prayed for in the originating summons. The application was heard *ex parte* the same day in the presence of the learned counsel for the plaintiff and an order in terms thereof was granted, and the application was accordingly directed to be heard on an *inter partes* basis on 19 April 2001.

On 12 April 2001, the plaintiff *vide* encl. (7) filed in another application, also upon a certificate of urgency, to amend the originating summons, ostensibly under the direction of this court. It must be emphasised, and the attention of the learned counsel for the plaintiff was also subsequently drawn to this very fact, that there was never such a direction. What indeed transpired at the hearing on 11 April 2001 was a remark by the court to the effect that the originating summons may not have been filed in accordance with the provisions of O. 7, to which the learned counsel for the plaintiff reacted by giving an undertaking to amend the same. (In this judgment, any reference to a particular Order and/or a rule by itself shall mean that Order and the rule in relation to that Order as they appear in the Rules of the High Court 1980).

The remark was made in order to avoid time being wasted with preliminary objections when the application came to be heard on an *inter partes* basis. However, the decision whether or not to apply to amend the originating summons was left entirely to the learned counsel for the plaintiff. This was made clear to him when the application came up for further hearing on 24 April 2001 and he gave an assurance to the court that he would take the necessary steps to correct the wrong impression created by his affidavit affirmed on 12 April 2001 in support of the application to amend the originating summons.

When the application to amend the originating summons had come up for hearing on 13 April 2001, this court had granted an order in terms thereof. The reliefs sought remained the same but the plaintiff went on to set out therein the bases therefor. The originating summons, as amended, became encl. (12) in the court file of the case.

On 19 April 2001, both the application in encl. (3) and the amended originating summons in encl. (12) came up for hearing in the presence of the learned counsel for both parties. At the outset, the learned counsel for the defendant raised a preliminary objection to the application on the ground that the plaintiff was only praying for interim injunctions in the amended originating summons and there was no prayer for any final relief at all. More

importantly, it was argued that there was no subsisting cause or matter disclosed in the amended originating summons and there was nothing to be tried before this court. In support of this contention, the learned counsel for the defendant referred to the case of *Lim Chong Construction Co Sdn Bhd v. Silam Quarry Sdn Bhd* [1990] 1 CLJ 1158; [1990] 2 CLJ (Rep) 374 where Zakaria Yatim J (as he then was), after having examined the general indorsement in the writ, stated as follows:

> Since a trial is envisaged the plaintiff must show that he has a cause of action. The grant or refusal of an interlocutory injunction therefore depends on whether there is a cause of action. In *Siskina v. Distos Compania Naviera SA* [1979] AC 210, Lord Diplock, in his speech at page 256, said:
>
> > A right to obtain an interlocutory injunction is not a cause of action. It cannot stand on its own. It is dependent upon there being a pre-existing cause of action against the defendant arising out of an invasion, actual or threatened by him, of a legal or equitable right of the plaintiff for the enforcement of which the defendant is amenable to the jurisdiction of the court. The right to obtain an interlocutory injunction is merely ancillary and incidental to the pre-existing cause of action. It is granted to preserve the *status quo* pending the ascertainment by the court of the rights of the parties and the grant to the plaintiff of the relief to which his cause of action entitles, which may or may not include a final injunction.

The case of *Utusan Melayu (Malaysia) Berhad and Another v. Chan Tse Yuen* [1989] 1 CLJ 149; [1989] 1 CLJ (Rep) 163 was also cited and the learned counsel for the defendant referred to that part of the decision of Mohd Azmi SCJ (as he then was) where it was stated as follows:

> It is pertinent to observe that the plaintiff's action by originating summons dated 9 June 1987 contained prayers solely for injunctive remedy. On the basis of *American Cyanamid Co v. Ethicon Ltd* [1957] AC 396, it is a well-established principle that an interlocutory injunction is a discretionary relief. It is a form of judicial relief whereby the court orders a party to the proceedings either to refrain from doing specific acts or to do certain specified acts. It may be granted if it appears to the court to be just or convenient so to do in order to safeguard the position of one of the parties until his rights can finally be determined at the trial of the action. So long as there is a serious question to be tried, that is to say, so long as the plaintiff's claim is not frivolous or vexatious, the court should go on to consider whether the balance of convenience lies in favour of granting or refusing the interlocutory relief.

The learned counsel for the defendant argued that the reliefs sought by the plaintiff in the amended originating summons were also solely injunctive in

nature and that in view of the decision in *Utusan Melayu (Malaysia) Berhad (supra)*, there was clearly no reason for this court to proceed to hear the amended originating summons on its merits.

On the argument that there was no subsisting cause or matter disclosed in the amended originating summons, it is appropriate at this juncture to refer to the brief particulars given by the plaintiff in support of the reliefs prayed for therein. There are altogether eight paragraphs of brief particulars and the two more pertinent ones are paras. (d) and (f) which read as follows:

> (d) Pada 2.9.1999 defendan telah menyerah-hak semua hak, kepentingan dan lain di dalam kontrak tersebut kepada Islamic Investment Company of the Gulf (Bahrain) EC;
>
> (e) ...
>
> (f) Pada 18.12.1999 melalui Guaman No D7-22-3111-1999 di antara plaintif dan defendan ('tindakan writ saman tersebut') yang sama, Mahkamah telah membuat perintah supaya semua prosiding selanjutnya di dalam writ saman tersebut digantung sementara menunggu penyelesaian muktamad prosiding timbangtara di antara plaintif dan defendan.

A free translation of this into English reads as follows:

> (d) On 2.9.1999 the defendant surrendered all rights, interests and others *(sic)* under the said contract to the Islamic Investment Company of the Gulf (Bahrain) EC;
>
> (e) ...
>
> (f) On 18.12.1999 by way of Suit No D7-22-3111-1999 between the same plaintiff and the defendant ('the said writ action'), the court had ordered all proceedings in the said writ action to be stayed pending the final disposal of the arbitration proceedings between the plaintiff and the defendant.

It must be noted that the above two paragraphs of particulars are also reiterated in paras. 12 and 19 of the affidavit in support of one Krishnamoorthy Gnanamoorthy, the financial controller of the plaintiff, affirmed on 10 April 2001 and filed in relation to the *ex parte* application in encl. (3) dated 11 April 2001 which was heard the same day. In that affidavit in support at encl. (1), the said Krishnamoorthy had deponed to the effect that the plaintiff and the defendant had entered into a contract on 24 April 1998 whereby the plaintiff was appointed as contractor to carry out certain works for the defendant. Clause 19 of the contract required the plaintiff to furnish the defendant with an irrevocable and unconditional first-call bank guarantee for

a sum of not less than ten percent of the contract price for the due performance by the plaintiff of all its obligations under the contract.

Pursuant thereto, at the behest of the plaintiff, a bank called the Den Norske Bank ASA Singapore Branch ("the guarantor bank") issued a performance bond ("the performance bond" or "the bond") for the sum of USD1,644,800 in favour of the defendant irrevocably and unconditionally guaranteeing and undertaking to pay, as guarantor, to the defendant the said sum immediately upon receipt of a written demand from the defendant stating that the plaintiff had failed to comply with the contract, notwithstanding any contest, protest or counterclaim by the plaintiff or any other third party stating otherwise.

Krishnamoorthy went on to depone that on 24 November 1999, the plaintiff had received a notice from the guarantor bank informing the plaintiff that the defendant had made a claim on the performance bond through a letter stating that the plaintiff had failed to carry out its obligations under the contract and demanding payment under the performance bond.

He further stated that as a result of that demand made on the performance bond by the defendant, the plaintiff had instituted suit No 22-3111-1999 ("the earlier action") on 27 November 1999 seeking to injunct the defendant from calling upon or receiving any payment under the bond, and for damages because of its alleged wrongful recall. However, before the plaintiff's application for the injunction could be heard in the earlier action, the defendant had, on 18 December 1999, filed an application to stay, and obtained an order on 15 February 2000 staying, all further proceedings in that action pursuant to s. 6 of the Act and/or under the inherent jurisdiction of the court on the ground that the plaintiff and the defendant had agreed to submit to arbitration whatever disputes that arose between them under the contract and that whether the defendant had wrongfully demanded payment of the performance bond was a dispute, *inter alia*, that should be referred to arbitration. It was not in dispute that the arbitration was proceeding and had not been concluded yet.

It was also alleged on behalf of the plaintiff that the defendant did not have the necessary *locus standi* to issue the notice of demand on the performance bond to the guarantor bank. This was because by letter dated 2 September 1999 the defendant had given notice to the plaintiff that all the defendant's rights in the "warranties and/or guarantee(s) contained in the contract" entered into between them on 24 April 1998 had been assigned to a third party called the Islamic Investment Company of the Gulf (Bahrain) EC (see exh. "K5" to encl. (1)).

It was further contended on behalf of the plaintiff that the defendant could not make a call on the performance bond without first giving notice and an

opportunity to the plaintiff under the terms of the contract to rectify any breaches thereof, which the defendant had not done.

However, on 10 April 2001, solicitors acting for the guarantor bank had written to the solicitors for the plaintiff stating that the guarantor bank would make payment under the performance bond unless there was a court order which had the effect of excusing their client from doing so as, in their view, the order to stay all proceedings in the earlier action and refer the matters in dispute between the parties to arbitration was not free from doubt as to whether their client would be justified in not making payment under the performance bond.

In these circumstances, the plaintiff was seeking the reliefs set out in the amended originating summons at encl. (12) as irreparable damage would otherwise be caused to it as a contractor of repute in the gas and petroleum industry should the intention of the guarantor bank to make payment on the performance bond be carried out.

To my mind the above paras. (d) and (f) read together with the averments of the said Krishnamoorthy in his affidavit at encl. (1) connote serious questions to be tried in the amended originating summons and the existence of these questions would not justify the whole summons being dismissed *in limine* without the court proceeding to hear the same on its merits. The reliefs sought in the amended originating summons herein needed to be considered as an adjunct to the reliefs granted by this court in the connected earlier action and to that extent the cases cited above by the learned counsel for the defendant may well turn out to be distinguishable. I hasten to add that this is not a final ruling on the non-applicability of those cases as the hearing of the matter on its merits may throw a different complexion on the applicability of those cases to the facts of this case.

In this context, it is useful to refer to the judgment of Lord Diplock in *Dimbleby & Sons Ltd v. National Union of Journalists* [1984] 1 All ER 751 at p. 754 where he stated the following:

> The general principles to be applied by a judge in deciding whether or not to grant an interlocutory injunction were laid down by this House in *American Cynamid Co v. Ethicon Ltd* [1975] 1 All ER 504, [1975] AC 396. It is enough to quote a few sentences from the unanimous opinion of the House [1975] 1 All ER 504 at 510, [1975] AC 396 at 407:
>
> > The use of such expressions as "a probability", "a *prima facie* case", or "a strong *prima facie* case" in the context of the exercise of a discretionary power to grant an interlocutory injunction leads to

confusion as to the object sought to be achieved by this form of temporary relief. **The court no doubt must be satisfied that the claim is not frivolous or vexatious; in other words, that there is a serious question to be tried**. [Emphasis added]

The issues as to whether the defendant still retains any interest to call upon the performance bond and the effect of the order to stay all further proceedings in the earlier action are salient matters which ought to be considered fully by this court in the exercise of its discretionary power as to whether or not to grant the reliefs prayed for by the plaintiff.

For the foregoing reasons, I was of the view that the preliminary objection of the defendant should not be allowed and accordingly dismissed the same and ordered that the amended originating summons in encl. (12) be heard on its merits. By the time the preliminary objection came to be dismissed on the 22 May 2001, the *ex parte* interim injunction had automatically lapsed in accordance with O. 29 r. 1(2B) at the end of twenty-one days from the date on which it had been granted on 11 April 2001.

I had, at the outset of these proceedings when the preliminary objection was raised, intimated to the learned counsel for the defendant that I would have preferred to have heard the matter as a whole instead of dealing with it on a piecemeal basis but he was of the view that I should first deal with the preliminary objection as it would, if allowed, decide with finality the amended originating summons, to which expression of view the learned counsel for the plaintiff had no objection. In light thereof, I had allowed the learned counsel for the defendant to proceed with his arguments on the preliminary objection.

After I had, on 22 May 2001, dismissed with costs the preliminary objection raised by the learned counsel for the defendant and given directions as to the further conduct of this case, the learned counsel for the plaintiff applied orally for an "interim holding-over order" pending the hearing of the amended originating summons in encl. (12) on its merits. He was, however, informed that the decision of the Court of Appeal in *Cheah Cheng Lan v. Heng Yea Lee and Others* [2001] 1 CLJ 727, which is binding upon me, prevented me from acceding to his request. His response was "... I believe the Court of Appeal decision does not cover this situation." At the same time, the learned counsel for the defendant objected to any holding-over order being made as he was of the view that the decision of the Court of Appeal was clear and that this court had no power to grant such an order.

In this respect I disagreed with the contention of the learned counsel for the plaintiff, stating that I was bound to follow the decision of the Court of Appeal and consequentially ruled that I had no jurisdiction to grant a holding-over

order where the interim injunction, which had been granted *ex parte* pursuant to the application in encl. (3) made under O. 29 r. 1(2), had automatically lapsed. Further, as the hearing *inter partes* to set aside that *ex parte* injunction had not been concluded within twenty-one days of its being granted, for the reasons which appear in this judgment, and the conclusion of which hearing would have determined whether the injunction was to be continued or not, I did not have the jurisdiction to grant what would be tantamount to another *ex parte* interim injunction. In the words of his Lordship Lamin Mohd Yunus, the then President of the Court of Appeal, "... the life of an *ex parte* injunction cannot go beyond the period of 21 days" from the date on which it was granted (at para. h of p. 731 of *Cheah Cheng Lan (supra)*). However, had the learned counsel for the defendant not objected to the granting of a holding-over order, I believe *Cheah Cheng Lan (supra)* would not have prevented me from making such an order by consent of the parties.

Be that as it may, I for one envisage practical problems arising from a rigid adherence to the strict timeframes laid down in O. 29 r. 1. For instance, in the present case, the court granted the *ex parte* order for the interim injunction the very day the application therefor was filed, ie, on 11 April 2001, and at the same time the court fixed 19 April 2001 as the date for the holding of the *inter partes* hearing of the application, ie, before the expiry of twenty-one days from the granting of the *ex parte* order, as mandated by O. 29 r. 1(2BA).

When the application in encl. (3) came on for *inter partes* hearing together with the amended originating summons in encl. (12) on 19 April 2001, the learned counsel for the defendant informed the court that the amended originating summons had been served on the defendant only on 17 April 2001 and that he needed time to file an affidavit in reply if the court intended to hear the amended originating summons on its merits. However, he had a preliminary objection to make which, if allowed, would dispose of the amended originating summons itself with finality. In the circumstances he applied to proceed with arguments on the preliminary objection first, of which he had already given notice. In anticipation thereof, and to avoid being considered as abandoning his right to raise the preliminary objection, he had not filed any affidavit in reply on behalf of the defendant. This course of action was agreed to by the learned counsel for the plaintiff and the court accordingly allowed arguments to proceed.

At the conclusion of the hearing of arguments on the preliminary objection, the court reserved decision thereon to 24 April 2001, which was still within the twenty-one days prescribed by O. 29 r. 1(2BA) for the hearing of the application *inter partes*. However, on that date I indicated to the parties that I needed more time to consider the preliminary objection and rule thereon.

Had I willy-nilly made a ruling on 24 April 2001 to comply with the twenty-one day timeframe laid down in O. 29 r. 1(2BA) within which to hear and dispose of the application *inter partes*, I was of the view that I would not be able to do justice to the parties as I was not yet ready with my decision. I had to be absolutely sure that the preliminary objection was sustainable if I were to rule in favour of the defendant as such a ruling would effectively and drastically shut the plaintiff out without the application as well as the amended originating summons being heard on their merits. On the other hand, if I were to dismiss the preliminary objection, both the application for the injunction in encl. (3) and the amended originating summons in encl. (12) could still not have been heard on their merits that day as the learned counsel for the defendant would have had to be given further time to file the affidavit in reply of the defendant.

In these circumstances I fixed 22 May 2001 to rule on the preliminary objection with an assurance from the learned counsel for the defendant that the defendant would not proceed to make a call on the performance bond until then. In adopting the foregoing course of action, I was of the view that I was not running foul of the provisions of O. 29 r. 1(2B). That rule provides categorically as follows:

> Unless **sooner** revoked or set aside, an interim injunction obtained on an *ex parte* application shall automatically lapse at the end of 21 days from the date on which it is granted. [Emphasis added]

To my mind, the life of an *ex parte* interim injunction inures for twenty-one days. There cannot be any gainsaying that. However, its life may be terminated earlier than that upon the injunction being revoked or set aside. Such earlier termination would be the result of the *inter partes* hearing adverted to in O. 29 r. 1(2BA) which requires the court, when granting the *ex parte* interim injunction, to "forthwith fix a date for *inter partes* hearing to be held before the expiry of 21 days".

The issue in *Cheah Cheng Lan (supra)* was whether the High Court there had jurisdiction to resuscitate an *ex parte* interim injunction, the efficacy of which had lapsed or, to put it a little differently, the life of which had been terminated through effluxion of time upon the expiry of twenty-one days from the date on which it was granted. The President of the Court of Appeal posed the issue thus in the form of a statement in *Cheah Cheng Lan (supra)* at p. 730 of the report of that case:

> The applicant/appellant by this motion prays for an order 'that the order of the High Court dated 19 October 2000 setting aside an *ex parte* injunction order

dated 29 March 2000 be set aside and the *ex parte* injunction order dated 29 March 2000 continue to be in force and effect' until the disposal of the applicant/appellant's appeal. In other words the effect of the present application is to bring back to life the *ex parte* injunction granted on 29 March 2000 and to continue in full force and effect until the final disposal of the appeal by this court.

Speaking for the other members of the Court of Appeal as well, his Lordship referred to the cases of *Lim Nyook Yin v. Ultratech Sdn Bhd and Anothe*r [1995] 1 CLJ 215 and *Umas Sendirian Bhd v. RHB Bank Bhd and Another* [2000] 6 CLJ 564 upon which the learned counsel for the applicant/appellant before the Court of Appeal had relied to support his contention that the High Court has such power, ie, "to bring back to life the *ex parte* injunction granted on 29 March 2000 and (to make an order for it) to continue in full force and effect until the final disposal of the appeal" by the Court of Appeal.

He then reproduced the provisions of O. 29 r. 1(1), (2), (2B) and (2BA) for a better appreciation of their contents and went on to answer the issue he had posed in the following terms at pp. 731 to 732 of the report of the case:

Where the case is one of urgency the plaintiff in the suit may apply to the court *ex parte* for an interim injunction under r. 1(2). Now, the injunction obtained *ex parte* under the said r. 1(2) 'shall automatically lapse' at the end of 21 days from the date on which it is granted [r. 1(2B)]. Rule 1(2B) is prefixed by the phrase 'unless sooner revoked or set aside' and this must mean that the life of an *ex parte* injunction remains in force for only 21 days if it is not revoked or set aside before the expiry of 21 days because at the end of 21 days it 'shall automatically lapse'. Under r. 1(2BA) the *ex parte* injunction 'must be served' on the relevant party within one week of the date of the order granting it and the court when granting the injunction 'must forthwith fix a date for the *inter partes* hearing to be held before the expiry of the 21 days'. Under r. 1(2BA) it is made clearer that the life of an *ex parte* injunction cannot go beyond the period of 21 days. The *ex parte* injunction once obtained it is imperative that it be served within one week from the date it is obtained and on the day granting the injunction the court cannot postpone the fixing of the date of the *inter partes* hearing. It must on that day fix the date for the *inter partes* hearing and the date must be before the expiry of the 21 days. It is during the period of 21 days that all relevant decisions must be made such as either that it be revoked or set aside because at the end of 21 days it 'shall automatically lapse'. It is because that the decision to revoke or set aside must be made within the 21 days that the *ex parte* injunction once obtained must be served early (within seven days) so that the relevant parties may make the necessary preparation for appearing in court within the said period. The court has no power to extend the life of an *ex parte* injunction beyond 21 days because of the words 'shall automatically lapse' (see page 1353 *Malaysian High*

Court Practice: 1998 Desk Edition 1 MLJ). The learned judge in *Lim Nyook Yin* thought otherwise for he said at page 218 para B:

> It must be pointed out that in the *inter partes* hearing, the *ex parte* interim injunction may be further extended *inter partes* until the disposal of the main suit. That the court has such an inherent power to make such an order is beyond dispute (see O. 92 r. 4 of RHC).

With respect we are unable to accept that the High Court has an 'inherent power' to make such an order under the said rule. If we may reproduce below O. 92 r. 4 of RHC. It reads:

> For the removal of doubts it is hereby declared that nothing in these rules shall be deemed to limit or affect the inherent powers of the Court to make any order as may be necessary to prevent injustice or to prevent an abuse of the process of the Court.

The very nature that an interim injunction being *ex parte* we are of the view that in order to prevent injustice or to prevent an abuse of the process of the court that its life span must be limited. Before the insertion of r. 1(2B) in October 1993 [PU(A) 364/1993], an *ex parte* interim injunction obtained under r. 1(2) remained effective until set aside. Without putting a limit to its life span, the word interim can have no concrete meaning and it may even be open to abuse. It was further found necessary to tighten up the screws so as the application of r. 1(2B) would be more meaningful, so r. 1(2BA) had to be brought in. This new rule does not tolerate delay so that it spells out the time limit within which the interim injunction must be served. Also, on the day the *ex parte* interim injunction is granted, the court granting it must 'forthwith' fix a date of hearing *inter partes* and that it must be held 'before the expiry of the 21 days'. It is beyond doubt that r. 1(2BA) stresses the urgency and speedy disposal of the matter. With the operation of sub-rr. (2B) and (2BA), the life span of an *ex parte* injunction has been properly determined. It does not therefore admit the use of the inherent powers of the court as provided under O. 92 r. 4.

For the above reasons we dismissed the motion with costs.

When the subject-matter in the present case came to be heard *inter partes*, it had been taken out of the circumscribing limits of the provisions of O. 29 r. 1 as applicable to the revocation or setting aside of an *ex parte* interim injunction in that the application in encl. (3) had become merged in the amended originating summons in encl. (12). In these circumstances, the court was no longer concerned with the *inter partes* hearing of an order for an interim injunction granted *ex parte* for O. 29 r. 1(2BA), as interpreted by the Court of Appeal, to apply. On the other hand, as the life of an interim injunction granted on an *ex parte* application "shall automatically lapse at the end of 21 days from the date on which it is granted" in accordance with

O. 29 r. 1(2B), it followed that the court had no jurisdiction to resuscitate the lapsed interim injunction by breathing new life into it by a holding-over order.

I do not by this judgment for a moment say that the plaintiff in such circumstances is entirely without remedy as a scrutiny of the other rules in O. 29 would seem to suggest otherwise but as there was no application to invoke those rules, the same is not in issue.

For the foregoing reasons I did not allow the oral application of the learned counsel for the plaintiff to grant a holding-over order to preserve the *status quo* pending the hearing and disposal of encl. (12) with finality.